IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC

TUESDAY, THE 7TH AUGUST 2007 / 16TH SRAVANA 1929

WP(C).No. 24613 of 2006(E)

PETITIONER:

M. SUBHASH, S/O.THE LATE MAYANDI,
AGED 37 YEARS, RESIDING AT KOLAKKALAM
AMBATTUPALAYAM, CHITTOOR COLLEGE P.O.,
CHITTOOR, PALAKKAD DISTRICT.

BY ADV. SRI.O.V.RADHAKRISHNAN (SR.)
SMT.K.RADHAMANI AMMA
SRI.ANTONY MUKKATH
SRI.K.V.JOY
SRI.K.RAMACHANDRAN (THYKOODAM)

RESPONDENTS:
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1. **STATE OF KERALA,**
   REPRESENTED BY ITS CHIEF SECRETARY,
   SECRETARIAT, THIRUVANANTHAPURAM.

2. **DIRECTOR OF HEALTH SERVICES,**
   THIRUVANANTHAPURAM.

3. **DISTRICT MEDICAL OFFICER (HEALTH),**
   PALAKKAD.

4. **DISTRICT COLLECTOR,**
   COLLECTORATE, PAPAKKAD.

BY GOVERNMENT PLEADER SRI. NANDAKUMAR for R1 to R4

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.24613/2006 E

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE COMPLAINT PETITION DTD. 21/04/1997 MADE TO THE SUB INSPECTOR OF POLICE, CHITTOOR, POLICE STATION, PALAKKAD.**

EXT.P2: **COPY OF THE FIR NO.70/97 DTD. 21/04/1997 SUBMITTED BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT, CHITTOOR.**

EXT.P3: **COPY OF THE REPORT DTD. 30/07/1997 ON THE FILE OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, CHITTOOR.**

EXT.P4: **COPY OF THE G.O.(P) NO.12/99/P&ARD DTD. 24/05/1999 OF THE 1ST RESPONDENT.**

EXT.P5: **COPY OF THE NOTICE DTD. 22/06/2004 OF THE TAHSILDAR, CHITTOOR PUBLISHED IN THE KERALAGAZETTE DTD. 03/08/2004.**

EXT.P6: **COPY OF THE APPLICATION DTD. 22/09/2004 WITH ANNEXURES SUBMITTED TO THE 3RD RESPONDENT.**

EXT.P7: **COPY OF THE ORDER NO.EH.N.DIS.4/94694/04 DTD. 30/11/2004 OF THE 2ND RESPONDENT.**

EXT.P8: **COPY OF THE REPRESENTATION DTD. 01/03/2005 OF THE PETITIONER TO THE MINISTER OF HEALTH.**

EXT.P9: **COPY OF THE REPRESENTATION DTD. 25/07/2005 BEFORE THE HON'BLE CHIEF MINISTER OF KERALA.**

EXT.P10: **COPY OF THE GOVERNMENT LETTER DTD. 27/07/2005 GIVEN TO SRI. K.A.CHANDRAN, MLA.**

EXT.P11: **COPY OF THE LETTER NO.27270/2005/9/A3 DTD.13/01/2006 OF THE 4TH RESPONDENT.**

EXT.P12: **COPY OF THE GOVERNMENT LETTER NO.11467/2005/H&FWD DTD. 10/07/2006 OF THE 1ST RESPONDENT.**

/TRUE COPY/

P.S.TO JUDGE

KSS

Antony Dominic, J.

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W.P(C).No.24613 of 2006

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Dated this the 7th day of August, 2007.

JUDGMENT

This Writ Petition is filed praying for quashing Exts.P7 and P12 orders and for directing the respondents to grant appointment to the petitioner under Ext.P4 Compassionate Employment Scheme as recommended by the fourth respondent. An unmarried elder brother of the petitioner was appointed as Lower Division Clerk in the Health Department with effect from 25.11.1996. While so, he went missing from 15.4.1997 and Ext.P1 complaint was made to the Police Station concerned, based on which Ext.P2 First Information Report was registered. After investigation, the case was treated as undetected and eventually final report was filed before the Judicial First Class Magistrate Court, Chittoor on the basis that it was an undetected case.

2. Petitioner, unmarried younger brother of the Government servant, wanted to avail of the benefit of Ext.P4

Scheme for compassionate employment. Ext.P4 provided that dependents of Government servants missing while in service, if it is not proved otherwise as laid down in Section 108 of the Evidence Act, will be eligible for employment assistance under the scheme, treating that the incumbent had died while in service. Taking advantage of Clause 6 as stated above, he being a dependent in terms of Clause 14 of Ext.P4, petitioner made Ext.P6 application on 22.9.2004, which was rejected by Ext.P7. In an appeal filed by the petitioner before the Government of Kerala, an enquiry was ordered to be conducted by the District Collector and Ext.P11 is the report of enquiry. Ext.P11 states that the applicant had fulfilled all the conditions stipulated in Ext.P4 and that he was eligible for appointment as Lower Division Clerk under the Scheme. It also makes reference to the recommendation of the Tahsildar and ultimately, the report concludes by recommending the case of the petitioner for employment assistance under the Scheme for compassionate appointment.

3. On receipt of Ext.P11 report of enquiry, Government considered the matter afresh and issued Ext.P12 rejecting the

application of the petitioner on the basis that the service of the elder brother of the petitioner had been terminated with effect from 15.4.1997 and he was no longer a Government servant as on the date from which he was to be treated as dead under Section 108 of the Evidence Act. On this basis, petitioner was informed that his application cannot be considered under the existing orders. It is seeking to quash Exts.P7 and P12 and for consequential reliefs that this Writ Petition has been filed.

4. In the counter affidavit it is stated that the petitioner's elder brother joined duty on 25.11.1996 and while on probation, he unauthorisedly absented from duty from 15.4.1997 and that notices sent from District Medical Office, did not evoke any response. It is stated that ultimately, memo of charges was issued to his residential address, which also returned unserved and that thereupon, a show cause notice proposing punishment issued also met with the same fate. It is stated that show cause notice was thereafter published in leading newspapers and even in that situation, there was no response from the elder brother of the petitioner. According to the respondents, proceedings culminated by order dated 19.6.1998 when the service of the

petitioner's brother service was terminated with effect from 15.9.1997 for unauthorised absence from duty.

5. While senior counsel appearing for the petitioner asserted that the petitioner is entitled to the benefit of the Scheme only at the pointed time of Section 108 of the Evidence Act becomes operational, viz., after seven years from the date when the elder brother of the petitioner went missing, Learned Government Pleader would contradict it by saying that his service stood terminated with effect from 15.4.1997 and that there was no surviving right available to the petitioner to claim the benefit of Ext.P4.

6. In order to resolve the controversy, reference to the provisions of Ext.P4 is necessary. As already noted, Clause 6 of Ext.P4 provides as follows:

> "6. Dependents of Government Servants missing while in service, if it is not proved otherwise as laid down in Section 108 of the Indian Evidence Act, will be eligible for employment assistance under the scheme treating that the incumbent had died while in service."

It is beyond controversy that in the case of unmarried Government employee, his unmarried brother is a dependent eligible for employment assistance. In terms of Clause 6 extracted hereinabove, he would become eligible only if it is not proved otherwise as laid down in Section 108 of the Evidence Act. Section 108 of the Evidence Act provides that the question whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. Thus, Section 108 of the Evidence Act becomes operational only after seven years from the date the person went missing. In this case, Government servant is missing since 15.4.1997 and therefore Section 108 of the Evidence Act becomes operational only from April, 2004. It is immediately thereafter that Ext.P6 application was submitted by the petitioner claiming the benefit of Ext.P4 Scheme. Therefore, the request cannot be turned as belated.

7. Contention of the respondents that the Government servant was terminated with effect from 15.4.1997 also does not improve their case. As already mentioned, petitioner could claim

the benefit of Ext.P4 only after seven years from the date when the Government employee went missing. It is quite natural that in the meantime, in all such cases, disciplinary action would have ended in termination of service. But, if that is accepted as a reason for denying the benefit of the Scheme, that will render Clause 6 of Ext.P4 meaningless and I am not prepared to accept such a reasoning.

8. Almost identical situation in the context of defence service was considered by this Court in **Indira K.** v. **Union of India and others** – 2005(3) ILR 801. In that case, it has been held inter alia thus:

> "Therefore, as and when presumption of death is available under Section 108 of the Evidence Act, the whole position changes and the presumption of death supercedes the declaration of the person a deserter under Section 106 of the Army act. Consequently the family members can claim all benefits as if the man is dead on the date of his missing. Since it is admitted that the petitioner's husband has not surfaced and could not be traced after 5.10.1995 in spite of effort to trace him by the Police at the request by the Army, the presumption of his death as on 5.10.1995 is available

under Section 108 of the Evidence Act".

Proceeds further, it was held thus:

> "In the circumstances, O.P. is disposed of directing the respondents to grant all benefits to the petitioner and other family members treating as if petitioner's husband Mr.M.Radhakrishnan died in service on 5.10.1995. The respondents shall grant the benefits such as release of retirement benefits, grant of pension, appointment on compassionate grounds etc., within a period of four months from the date of production of copy of this judgment by the petitioner. The petitioner and family members will make required application along with copy of this judgment before the concerned authority for compliance of the judgment without any delay."

Thus, the case of the petitioner is similar and the petitioner has to be held to be eligible for the benefit of Ext.P4 Scheme.

9. For the aforesaid reasons, Exts.P7 and P12 orders rejecting Ext.P6 application filed by the petitioner deserve to be quashed and I do so. First respondent is directed to reconsider the matter and pass appropriate orders as expeditiously as possible, at any rate, within two months from the date of receipt of a copy of this judgment. Petitioner is directed to produce a

copy of this judgment before the first respondent for compliance.

Writ Petition is allowed.

Antony Dominic,
Judge.

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